**IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS**
**Kurtis T. Wilder, Presiding Judge**

**E.W. RAKESTRAW**
Plaintiff-Appellee,

v

Docket No. 120996

**GENERAL DYNAMICS LAND SYSTEMS**
Defendant-Appellant.
_____/

# REPLY BRIEF ON APPEAL - APPELLANT



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**MISCELLANEOUS**

## STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT[1]

The Court has jurisdiction to review the order which was entered by the Workers' Compensation Appellate Commission in *Rakestraw v General Dynamics Land Systems*, 2001 Mich ACO - (Docket no. 01-0170, rel'd October 16, 2001) after the Court of Appeals denied leave to appeal, *Rakestraw v General Dynamics Land Systems*, unpublished order of the Court of Appeals, decided on January 30, 2002 (Docket no. 237610) by authority of the Workers' Disability Compensation Act of 1969, MCL 418.101; MSA 17.237(101), et seq. MCL 418.861a(14); MSA 17.237(861a)(14), second sentence. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 706, 732; 614 NW2d 607 (2002). *Holden v Ford Motor Co*, 439 Mich 257, 262-263; 484 NW2d 227 (1992).

The application for leave to appeal was filed with the Court within twenty-one days after the Court of Appeals entered the order which denied leave to appeal.

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[1] This is the same description of the jurisdiction of the Court which was presented in the *Brief on Appeal - Appellant*, Statement of the basis for the jurisdiction of the Court, viii.

## STATEMENT OF QUESTION PRESENTED[2]

I

**WHETHER SYMPTOMS OF AN EXISTING CONDITION THAT AN EMPLOYEE HAS ARE A *PERSONAL INJURY* WITHIN THE AMBIT OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.**

Plaintiff-appellee Rakestraw answers "Yes."

Defendant-appellant General Dynamics answers "No."

Court of Appeals answered "Yes."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "Yes."

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[2] This is the same question which was propounded in the *Brief on Appeal - Appellant,* Statement of question presented, ix.

## STATEMENT OF FACTS[3]

Both the attending physician and a forensic specialist recognized that the work of plaintiff-appellee E.W. Rakestraw (Employee) for defendant-appellant General Dynamics Land Systems (Employer) had only provoked the symptoms of pain from arthritis and an earlier fusion of two vertebrae in the neck. (1a-2a, 3a-4a, 5a, 6a, 7a, 8a-9a)

The Employee filed an application for mediation or hearing with the Bureau of Workers' & Unemployment Compensation (Bureau) on April 18, 2000, claiming workers' disability compensation from the Employer because of a personal injury at work on September 29, 1999, which was described as *vigorous physical activity and stress which significantly caused, contributed to and aggravated a neck condition.* (10a) The Employer appeared and contested this claim with a carrier's response that was filed with the Bureau on June 14, 2000, denying a personal injury occurred. (10a) The Bureau remitted the case to the Board of Magistrates (Board) for a hearing and the disposition of the dispute.

The Board conducted a hearing and ordered the Employer to pay continuing weekly workers' disability compensation and medical, *Rakestraw v General Dynamics Land Systems, Inc*, unpublished order of the Board of Magistrates, decided on April 10, 2001 (Docket no. 041001003) (13a), with the decision that the Employee was disabled after September 29, 1999, by the symptoms of pain which had been provoked by work even though the existing condition in the neck itself was not changed at all. *Rakestraw v General Dynamics Land Systems, Inc*, unpublished opinion of the Board of Magistrates, decided on April 10, 2001 (Docket no. 041001003), slip op., 8. (21a)

The Workers' Compensation Appellate Commission (Commission) affirmed, *Rakestraw v General Dynamics Land Systems*, 2001 Mich ACO - (Docket no. 01-0170, rel'd October 16, 2001) (24a), only because the rule of stare decisis required applying

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[3] These are the same facts which were recited in the *Brief on Appeal - Appellant*, Statement of facts, 1-2.

case law from the Court of Appeals that was criticized. *Rakestraw v General Dynamics Land Systems*, 2001 Mich ACO 1426, 1430. (29a-30a)

The Court of Appeals denied leave to appeal. *Rakestraw v General Dynamics Land Systems*, unpublished order of the Court of Appeals, decided on January 30, 2002 (Docket no. 237610). (31a)

The Court granted leave to appeal and allowed for filing a brief amicus curiae by people or groups who were interested in the determination of the question. *Rakestraw v General Dynamics Land Systems*, 467 Mich 915 (2002). (32a)

## SUMMARY OF ARGUMENT

An appreciation of the meaning and process of gloss allows for the full understanding and a proper application of the case law presented in the *Brief on Appeal - Appellee*.

## ARGUMENT

### I

### SYMPTOMS OF AN EXISTING CONDITION THAT AN EMPLOYEE HAS ARE NO *PERSONAL INJURY* WITHIN THE AMBIT OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.

*Gloss* means *a word inserted between the lines or in the margin as an explanatory equivalent of a foreign or otherwise difficult word in the text. Oxford English Dictionary* (Oxford University Press 1989). *Gloss* is used in extended senses in legal contexts. For example, "the function of chancery was to supply the deficiencies of the common law; thus equity was, in the words of Maitland, 'a *gloss* on the common law.'" See B.A. Garner, *A Dictionary of Modern Legal Usage, Second Edition* (Oxford University Press 1995).

In the most extended sense, *gloss* is used as a collective noun which is synonymous with *pronouncements, usually by a court.* It is this extended sense which is the basis of the term *case law gloss*.

*Gloss* or *case law gloss* strictly depends on the fidelity of a court to the text that was the particular subject of consideration. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002). *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), reh den 467 Mich 1212 (2002). In these cases and others too numerous to cite, the Court considered all of the existing case law gloss which was then either ratified, explained or repudiated based on the fidelity to the actual text of the particular statute that was the subject of consideration. For example, in the case of *Mudel, supra*, the Court ratified the case law of *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992) as gloss which was faithful to the text of the statutes in the WDCA that were the subject of consideration, MCL 418.861a(3), (14); MSA 17.237(861a)(3), (14); reversed the case law of *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997) and *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494; 581 NW2d 244 (1998) that were not; and redacted *Woody v Cello-Foil Products (After Remand)*, 450 Mich 588; 546 NW2d 226 (1996) as consistent with the text after all. *Mudel, supra*, 701-704, 705-706, 708, 711, 712-713.

In the more recent case of *Robertson, supra*, the Court eschewed the existing case law gloss that had disregarded the actual text of MCL 418.301(2); MSA 17.237(301)(2), second sentence, which was the particular statute that was the subject of consideration. *Robertson, supra*, 756-757. There, the Court said that,

> ". . . these same values are also furthered by judicial decisions that are neutrally grounded in the language of the law, by a legal regime in which the public may read the plain words of its law and have confidence that such words mean what they say and are not the exclusive province of lawyers. Stare decisis is not to be 'applied mechanically to forever prevent the Court from overruling earlier erroneous decisions interpreting the meaning of statutes.' *Id.* at 463.
>
> Before this Court overrules a decision, we must make two inquiries: (a) whether the earlier decision was wrongly decided, and (b) whether overruling such decision would work an undue

> hardship because of reliance interests or expectations that have arisen. *Id.* at 464-468.
>
> With regard to the first inquiry, we believe that *Gardner*, in relevant part, was wrongly decided, clearly misconstruing the plain language of § 301(2) and rendering superfluous the entire second clause of the second sentence in violation of the cardinal rule of interpretation that effect shall be given to every word, phrase, or clause of a statute. *Hoste*, supra; *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999)."

Case law gloss which is faithful to a text continues as the text itself continues. *Harry Becker & Co v Wabash R Co*, 335 Mich 159; 55 NW2d 776 (1952). *Hurd v Ford Motor Co*, 423 Mich 531; 377 NW2d 300 (1985). In the case of *Harry Becker & Co, supra*, 164, the Court said that, "we have no difficulty in holding that a case decided prior to the enactment of an amendment is not any authority for the interpretation of the amendment."

In the case of *Hurd, supra*, the Court held that case law gloss of a statute in the WDCA, *Deziel v Difco Laboratories, Inc (After Remand)*, 403 Mich 1; 268 NW2d 1 (1978), could not apply to a case which was subject to an amendment of that statute, section 301(2), first sentence. *Hurd, supra*, 534. There, the Court held that, "MCL 418.301(2); MSA 17.237(301)(2) was enacted to invalidate this Court's decision in *Deziel v Difco Laboratories, Inc (After Remand)*, 403 Mich 1; 268 NW2d 1 (1978), thus effecting a substantive change in the law and that the provisions of this amendment have prospective application." See also *Dean v Chrysler Corp*, 434 Mich 655, 666-667; 455 NW2d 699 (1990), reh den 435 Mich 1204; 465 NW2d 916 (1990).

The precept of fidelity to the text profoundly distinguishes the process of glossing from other modes for deciding and announcing case law. In particular, the precept bars a court from considering the need, the propriety, and the consequences of a statute. *Crane v Reeder*, 22 Mich 322 (1871). *Warren Twp v Engelbrecht*, 251 Mich 608; 232 NW 346 (1930). *People v Breen*, 326 Mich 720; 40 NW2d 778 (1950). *Rowell v Security Steel Processing Co*, 445 Mich 347, 368; 518 NW2d 409 (1994) (RILEY J., dissenting). *Robertson, supra*. In the case of *Crane, supra*, 340-341, the Court per Justice Christiancy held that,

". . . it might seem to the legislature--as it certainly seems to me--it would be wiser policy for the state to forego its claims, and leave such occupants in possession, than to sell the property at private sale, without inviting competition or giving the occupant an opportunity to preserve his possession by competing at the sale. But these are considerations of policy appealing to the good sense of the legislature, and bearing as well upon the question of a *proper statute of limitations, as [341 upon the mode of sale. All questions of this kind the legislature have a right to decide, while the courts have none.

It might have been more judicious for the state officers, though the statute did not require it, after the escheat was brought to their attention, to have offered the lands at public sale. But this is equally a question of policy or discretion which was within their jurisdiction to decide, and which we have no power or inclination to review."

Justice Riley echoed this principle in dissenting in the case of *Rowell, supra,* 368,

"[t]his case is not one about the justice or injustice of the statute involved. The majority bases its holding on the possible unfairness that might result from the application of the clear language. Yet, within our system of separate powers, the lawmaking function resides with the Legislature, not this Court. *Roosevelt Oil Co v Secretary of State*, 339 Mich 679, 694; 64 NW2d 582 (1954) ('it is not the function of the court to legislate'). Thus, unless proven unconstitutional, '[t]he wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere.' *Melia v Employment Security Comm*, 346 Mich 544, 561; 78 NW2d 273 (1956). 'Adherence to the language and legislative intent of a statute is essential to ensure that 'courts . . . declare the sense of the law' and do not 'exercise will instead of judgment . . . .' Hamilton, *The Federalist Papers*, No 78, Kramnick, ed (England: Penguin Books, 1987 [originally published in 1788]), p 440.' *Coleman, supra* at 65. In other words, as a court of law, we do not create law or base opinions on questions of policy or our personal feelings. To the contrary, when construing a statute, our objective must only be to discern the Legislature's intent."

This precept cannot apply when there is no text for a court to consider. Then, a court *must* consider the need, the propriety, and the consequences of the existing case law. This process is the process of the common law. *Parker v Port Huron Hosp*, 361 Mich 1; 105 NW2d 1 (1960). *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88

(2000). *James v Alberts*, 464 Mich 12; 626 NW2d 158 (2001). *Lugo v Ameritech, Inc*, 464 Mich 512; 629 NW2d 384 (2001). In these cases, there was no text for the Court to gloss. Instead, in these cases, there was *only* the existing case law which comprised the body of common law. This required the Court to access the need, the propriety, and the consequences of the rule. *This* process led to change in *Stitt, supra*, and *James, supra*. For example, the Court held in *Stitt, supra*, 607,

> ". . . a majority of jurisdictions considering the issue have adopted the public invitee definition set forth in § 332 of the Restatement. However, in exercising our common-law authority, our role is not simply to 'count heads' but to determine which common-law rules best serve the interests of Michigan citizens. We believe that Michigan is better served by recognizing that invitee status must be founded on a commercial purpose for visiting the owner's premises.
>
> For the above stated reasons, we hold that persons on church premises for other than commercial purposes are licensees and not invitees."

In the case of *James, supra*, 18, the Court decided that,

> ". . . we believe it would have been better for the *Diefenbach* Court to opine, as Justice TALBOT SMITH did sometime later with respect to another antiquated rule:
>
> > The reasons for the old rule no longer obtaining, the rule falls with it. [*Montgomery v Stephan*, 359 Mich 33, 49; 101 NW2d 277 (1960).]
>
> That we do today.
>
> We return this area of the law to traditional agency and tort principles, comfortable that they will better resolve the matters to which the doctrine might have applied."

The Employee fails to appreciate this and presents the Court with case law as a single body of law.

### A. THE RULE OF INTERPRETATION WHICH WAS EXPRESSED IN *DEZIEL v DIFCO LABORATORIES, INC (AFTER REMAND)*, 403 MICH 1; 268 NW2d 1 (1978) IS NOT VALID.

The Employee declares that the statute in the WDCA which is the subject of consideration, MCL 418.301(1); MSA 17.237(301)(1), first sentence, is "entitled to a liberal construction, with ambiguities resolved in favor of compensability. *Deziel v Difco Laboratories [Inc (After Remand)]* 403 Mich 1, 33-35 [268 NW2d 1 (1978)]." *Brief on Appeal - Appellee*, Argument III, 22. *Deziel, supra*, is not valid. First, *Deziel, supra*, defies the command of the Legislature for glossing a statute established by MCL 8.3a; MSA 2.212(1) that states,

> "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

There is no special statute in either MCL 8.3a - 3w; MSA 2.212(1) - (23) or the WDCA which exempts any statute in the WDCA from this.

Second, *Deziel, supra*, created a rule for glossing a statute in the WDCA that was based only upon the status of the parties with the employee embraced as a ward of the Court whose status required construing the text in a way to award compensation, *Deziel, supra*, 34-35, n 14, "[b]y progressively or liberally, this Court means 'for compensation.' If a disabling injury is incurred and the general circumstances lead to the conclusion that it was work-related, compensation should be awarded," and the employer as a target whose arguments could be casually dismissed as if from a person who did not really have any standing to object because it was the consumer of the product or service that would *really* pay for any increased cost or from one who was simply an alarmist, *Deziel, supra*, 35-36,

> "[e]mployers are concerned that the utilization of a strictly subjective causal nexus standard in cases involving mental disabilities may encourage malingering, shamming and outright fraud. This Court understands and shares the employers' concern, even though that apprehension may be slightly exaggerated."

This is a preferential rule and the Court has rejected such preferential or "dice loading" rules since *Deziel, supra*. *Crowe v Detroit*, 465 Mich 1, 13; 631 NW2d 293 (2001). *Maier v Gen Tel Co of Michigan*, 466 Mich 879, 881-882; 645 NW2d 654 (2002) (CORRIGAN, C.J., concurring). Chief Justice Corrigan aptly stated in *Maier, supra*, 881-882, that,

> "[c]ourts lack authority to 'load the dice' for a particular result. Scalia, *supra* at 27. This Court recently clarified that the preferential rule favoring a liberal interpretation of remedial statutes such as the WDCA does not apply where the text of the statute is clear. *Crowe v Detroit*, 465 Mich 1, 13 (2001). This Court further stated:
>
> > In any event, if the statutory language were ambiguous, our first duty is to attempt to discern the legislative intent underlying the ambiguous words. Only if that inquiry is fruitless, or produces no clear demonstration of intent, does a court resort to the remedial preferential rule relied on in the dissent. [*Id.*]
>
> Justice Scalia has argued forcefully against the use of preferential rules, including the one involved in this case:
>
> > To the honest textualist, all of these preferential rules and presumptions are a lot of trouble. It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. How 'narrow' *is* the narrow construction that certain types of statute are to be accorded; how clear does a broader intent have to be in order to escape it? . . .
> >
> > But whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it. [Scalia, *supra* at 28-29 (emphasis in the original).]"

Third, the *Legislature* repudiated *Deziel, supra*, by amending the WDCA in 1980, 1980 PA 357, to establish a specific rule for mental disability. *Hurd, supra*, 534. The enactment is as much a rejection of the mode of decision as this result in *Deziel, supra*.

Finally, *Deziel, supra,* decided (collapsed) the post-modifier of the noun *injury* in the subordinate clause of the statute *who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury* which is *arising out of and in the course of employment.* The Court did not consider the pre-modifier of *injury* which is *personal* because there was a *personal injury* in the form of *medically identifiable damage to the body of the employee distinct from any existing condition.* In *Deziel, supra,* 11, the Court recited the fact that the employee had glass in the eyes when a test tube broke!

The Employee states that the words *personal injury* are ambiguous. *Brief on Appeal - Appellee,* Argument II C, 21. It is recognized that a word is not ambiguous simply because one or another dictionary defines it in a variety of ways. *Koontz v Ameritech Services, Inc,* 466 Mich 304, 317; 645 NW2d 34 (2002). *People v Jackson,* 467 Mich 938, 939; - NW2d - (2002) (CORRIGAN, C.J., concurring). The Employer relies on the common and approved usage of the English language as previously expressed in the *Brief on Appeal - Appellant.*

### B. *PAGE v MITCHELL,* 13 MICH 63; 86 AD 75 (1864) AND *MAY v WILSON,* 164 MICH 26; 128 NW 1084 (1910) DO NOT APPLY.

The Employee presents the Court with the case law of *Page v Mitchell,* 13 Mich 63; 86 AD 75 (1864) and *May v Wilson,* 164 Mich 26; 128 NW 1084 (1910). *Brief on Appeal - Appellee,* Argument II A, 18, Argument II C, 21. These cases do not apply. First, these cases did not consider the meaning of *personal injury* in section 301(1), first sentence, which is the statute that is the subject of this case having been decided before the WDCA was enacted.

Second, there is no reason to conclude that the WDCA was enacted to include one or another of these cases. The WDCA was enacted to preempt the existing case law describing the common law of torts, in general, and master and servant, in particular.

*Boshaw v J J Newberry Co*, 259 Mich 333; 243 NW 46 (1932). *Hesse v Ashland Oil, Inc*, 466 Mich 21, 27-29; 642 NW2d 330 (2002), reh den 466 Mich 1214; 645 NW2d 668 (2002).

Finally, glossing describes how any reader of text would discern the language and not how the author might have understood the words. The task of learning how an author might have understood the words is really impossible with a statute because the author is a body of individuals and invites an exercise in telepathy or, here, a seance. See generally, Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997), 29-32. A textualist, Justice Scalia said,

> ". . . the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used"

and

> "[b]ut assuming, contrary to all reality, that the search for 'legislative intent' is a search for something that exists, that something is not likely to be found in the archives of legislative history."

Certainly, the Court is allowed to read a statute. But the Court is not the only reader. Citizens are readers too and the Court ought not to read a statute any differently than a citizen. Indeed, that is the command of MCL 8.3a; MSA 2.212(1): to gloss by the common and approved language.

No *reader* would think that *personal injury* embraces *symptoms*. Certainly, the Employee cites no dictionary or other source for the idea that the common and approved usage of the English language equates *injury* and *symptoms*. Likely, the Employee would be surprised as any ordinary person to learn that sleeping was an injury and not a symptom of existing fatigue; sneezing was an injury and not a symptom of an existing allergy; and belching was an injury and not a symptom of existing gas.

### C. *WILKINSON v LEE*, 463 MICH 388; 617 NW2d 305 (2000) DOES NOT APPLY.

The Employee cites the case law of *Wilkinson v Lee*, 463 Mich 388; 617 NW2d 305 (2000) as a contradiction of the case law gloss of *personal injury* in *Kostamo v Marquette Iron Mining Co*, 405 Mich 105; 274 NW2d 411 (1979). *Brief on Appeal - Appellee*, Argument IV E 2, 35.

The Court held in the case of *Wilkinson, supra*, 395, that, "regardless of the pre-existing condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition." *The recovery* which was described in *Wilkinson, supra*, was NOT the recovery of workers' disability compensation from an employer by the terms of the WDCA. *Wilkinson, supra*, was NOT case law gloss of section 301(1), first sentence, which is the text that is the subject of exposition here. Instead, *the recovery* which was described by the Court in *Wilkinson, supra*, was the recovery of money damages from the driver of an automobile by the terms of the common law of negligence. In sharp contrast to the process of glossing by the Court in the case of *Kostamo, supra*, which required strict fidelity to the text, the Court was free to describe what it thought was the best rule in deciding the case of *Wilkinson, supra*.

That the Legislature and the Court do not establish the same rule should not be surprising. That the Legislature and the Court do not establish the same rule is not license for the Court to eviscerate the text of a statute and impose the common law decided upon by the Court.

Also, the Court may recognize the real difference between the text of the statute in the WDCA which is before the Court here, section 301(1), first sentence, and the text of the statute in the Insurance Code of 1956 (Insurance Code), MCL 500.100; MSA 24.1100, et seq., which allowed the common law action in *Wilkinson, supra*. MCL 500.3135(1); MSA 24.13135(1).

A person is eligible for workers' disability compensation only when experiencing a *personal injury* as section 301(1), first sentence, of the WDCA states that

*an employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury shall be paid compensation as provided in this act.* No text describing *personal injury* is found in section 3135(1) of the Insurance Code. Three quite different criteria are described by that law. A person is eligible to recover non-economic damages from an auto crash when experiencing death, serious impairment of body function, or permanent serious disfigurement as section 3135(1) of the Insurance Code states that *a person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.*

As previously explained in the *Brief on Appeal - Appellant*, these criteria of the Insurance Code are not a *personal injury*. *Death* is not a *personal injury* within the rubric of section 301(1), first sentence, because it is a subject which is described by another statute in the WDCA. Section 301(1), second sentence. *Serious impairment of body function* is not a *personal injury* within the rubric of section 301(1), first sentence, but instead is akin to *disability* which is described by other statutes in the WDCA. See, e.g., MCL 418.301(4); MSA 17.237(301)(4), first sentence. *Permanent serious disfigurement* is not a *personal injury* within the rubric of section 301(1), first sentence, as the permanency or gravity of an injury is not important by the terms of section 301(1), first sentence. In conclusion, the symptoms of an existing condition could well be a *serious impairment of body function* to meet the criteria of section 3135(1) of the Insurance Code to allow the action in *Wilkinson, supra*, but not a *personal injury* to meet the separate criteria of section 301(1), first sentence, of the WDCA to allow the recovery of workers' disability compensation.

### D. THE CASE LAW GLOSS OF THE WDCA WHICH THE EMPLOYEE PRESENTS ARE ONLY FURTHER EXAMPLES OF THE RULE THAT A *PERSONAL INJURY* IS *MEDICALLY IDENTIFIABLE DAMAGE TO THE BODY OF THE EMPLOYEE WHICH IS DISTINCT FROM ANY EXISTING CONDITION.*

The Employee refers the Court to a large part of the case law gloss of section 301(1), first sentence, which is said to include the symptoms of an existing condition as a *personal injury*. *Schroetke v Jackson-Church Co*, 193 Mich 616; 160 NW 383 (1916). *Blaess v Dolph*, 195 Mich 137; 161 NW 885 (1917). *Dove v Alpena Hide & Leather Co*, 198 Mich 132; 164 NW 253 (1917). *Klein v Len H Darling*, 217 Mich 485; 187 NW 400 (1922). *Carvey v W D Young & Co*, 218 Mich 342; 188 NW 392 (1922). *Frankamp v Fordney Hotel*, 222 Mich 525; 193 NW 204 (1923). *Beaty v Foundation Co*, 245 Mich 256; 222 NW 77 (1928). *Sherman v Winkelman Bros Apparel, Inc*, 262 Mich 214; 247 NW 159 (1933). *Curley v Beryllium Corp*, 278 Mich 23; 270 NW 202 (1936). *Cazan v Detroit*, 279 Mich 86; 271 NW 561 (1937). *Rainko v Webster-Eisenlohr, Inc*, 306 Mich 328; 10 NW2d 903 (1943). *Carter v General Motors Corp*, 361 Mich 577; 106 NW2d 105 (1960). *Deziel, supra*. See *Brief on Appeal - Appellee*, Argument IV B, 24-25, Argument IV C, 25, 26, Argument IV D 1, 27-28, Argument IV E 1, 30. Actually, just one of these decisions supports the idea that the symptoms of an existing condition is a *personal injury* within the rubric of section 301(1), first sentence. That lone case law gloss is *Carter, supra*.

Perhaps the most obvious demonstration of this is that the decisions of the Court of Appeals which have explicitly announced that symptoms of an existing condition is a *personal injury*[4] have relied on *Carter, supra*, and only *Carter, supra*. Not a single decision by the Court of Appeals saying that the symptoms of an existing condition is a *personal injury* has relied on the case law gloss of *Schroetke, supra*, through *Rainko, supra*.

Also, *Carter, supra*, itself did not rely on the case law gloss of *Schroetke, supra*, through *Rainko, supra*. The Court candidly recognized that the problem which was presented was unique and not within the existing case law gloss by stating in *Carter, supra*, 585, that,

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[4] See *Brief on Appeal - Appellant*, Argument I F, 28-29.

> "[w]hether the cause of such emotional disability is a direct physical injury (*Redfern* v. *Sparks-Withington Co.*) or a mental shock *(Klein* v. *Len H. Darling Co.*), we have held the disability compensable. What distinguishes the case at bar from our other decisions which recognize the compensability of such disabilities is that this plaintiff's disability was caused by neither a single *physical* injury to plaintiff nor by a single mental shock to him. Instead, his disability was caused by emotional pressures produced by production line employment not shown by him to be unusual in any respect,–that is, not shown by him to be any different from the emotional pressures encountered by his fellow workers in similar employment." (emphasis by the Court)

Indeed, this statement by the Court in *Carter, supra*, 585, reveals that there was no case law gloss then which involved a claim for workers' disability compensation without *medically identifiable damage to the body of the employee which is distinct from any existing condition* constituting a *personal injury*!

Inspection of the case law gloss which the Employee presents reveals that every one involved *medically identifiable damage to the body of the employee which was distinct from any existing condition* and only further, concrete examples of the application of the case law gloss of *personal injury* by the Court in *Marman v Detroit Edison Co*, 268 Mich 166; 255 NW 750 (1934), *Kostamo, supra, Miklik v Michigan Special Machine Co*, 415 Mich 364; 329 NW2d 713 (1982), *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993), and *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57; 523 NW2d 444 (1994), reh den 447 Mich 1202; 525 NW2d 453 (1994).

In the case of *Schroetke, supra*, 617, the Court observed that the employee had damage to the body, the heart, which was identified by a physician, and died,

> ". . . after beginning his work at said foundry and shops a fire broke out, and deceased attempted to extinguish it, and spread an alarm thereof, and as a result of his efforts to give the alarm of the fire and attendant excitement he died of heart failure, the death being hastened and caused, in whole or in part, thereby. He died in said foundry immediately after the arrival of the fire department. Compensation was denied by the committee of arbitration and this decision was affirmed by the full board.

> The testimony taken before the committee of arbitration is all contained in the record, and it may be said that the evidence is undisputed. Immediately after the death of Mr. Schroetke, and while the body was still lying in the building, Dr. W. F. Morse was called to the plant and examined the body. He testified that he saw no signs of external marks upon the body, and that from the examination he was of the opinion that Mr. Schroetke died from heart trouble;"

In the case of *Blaess, supra,* 141-142, the Court observed that the employee had damage to the body which was distinct from an existing condition, a laceration or cut on the finger, that a physician identified, which led to death by allowing a streptococcus infection,

> "[the employee] began to suffer from a virulent streptococcus infection which came through a small cut in his finger, which cut was received in a manner not disclosed by any direct evidence; that such virulent infection could only come, according to the medical testimony, directly from a body containing a streptococcus infection; and that no other case of streptococcus infection was shown to have existed where Mr. Blaess could have acquired the infection, as it would develop within 24 to 48 hours, and might develop sooner than 24 hours. Dr. Gates, who attended the deceased from the beginning, testified that deceased had a small sharp cut on the ring finger of his left hand, which, when he first saw it on December 2, was red and inflamed. His diagnosis of the trouble was:
>
> 'Streptococcus septicemia, gaining entrance through this cut in this finger, escaping the lymphatic glands in his arm and lodging in the lymphatic glands in his neck and breast.'"

Similarly, in *Dove, supra,* and *Klein, supra,* the employee had damage which was distinct from anything ever before which a doctor recognized and died from it. *Dove, supra,* 133, "the cause of death was given by the attending physician as 'septic infection and heart trouble." *Klein, supra,* 487.

In the case of *Beaty, supra,* the employee experienced brain damage and died from caisson disease which is commonly known as "the bends" when nitrogen in the blood converts to a free gas during decompression. *Beaty, supra,* 258.

None of these cases involved an existing condition which was symptomatic because of some activity at work. All involved damage to the body which was identified and described by doctors.

Also, these cases involved a *death*. Death is not a symptom. Death is a distinct condition and specific text in the WDCA recognizes this by stating that *In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act.* Section 301(1), second sentence.

In the case of *Carvey, supra,* 344-345, the Court recited the diagnosis by a physician that the employee had damage to the body – the shoulder and the brain, a cerebral hemorrhage – which were entirely distinct from any existing condition.

Similarly, the employee in the case of *Frankamp, supra,* did not have the symptoms of some existing condition at work such as a bout of symptoms from malaria contracted before hiring. The employee in the case of *Frankamp, supra,* contracted typhoid fever because of contaminated water at work. *Frankamp, supra,* 526.

Similarly, in the cases of *Sherman, supra, Curley, supra,* and *Cazan, supra,* there was, indeed, medically identifiable damage to the body of the employee which was distinct from any existing condition. None experienced symptoms of some earlier, existing condition. *Sherman, supra,* 215, recognized specific damage, irritation of the skin, and excluded the idea that it was an existing condition. The Court ruled that it was contracted first at work,

> "[p]hysicians who examined and treated her testified from their own observations and knowledge and from the history supplied by plaintiff that in their opinion the irritation was caused by handling the furs. Other common causes of such an irritation were named and eliminated."

In *Curley, supra,* 26, the Court recapitulated the diagnosis of a physician that the employee had contracted bronchitis from chlorine gas exposure at work, *not* some cough or symptom of an existing condition,

> "[t]his physician stated that Curley had shortness of breath and difficulty in breathing due to moisture in his lungs as a result of irritation of the lining of the bronchi and the small air cells. Plaintiff recieved medical treatment for some time and absolute rest was enjoined in order to remedy the chronic bronchitis resulting from his exposure to the released chlorine gas."

And in *Cazan, supra,* 88, the Court observed that doctors diagnosed a respiratory infection and kidney damage (nephritis) from carbon monoxide poisoning at work,

> "[the employee] was taken to the Highland Park General Hospital where he was found to be suffering from carbon monoxide poisoning. [Later], he called in Dr. Hillier who diagnosed his condition as an acute naso-respiratory infection and chronic nephritis. On January 21, 1935, [the employee] was removed to Harper Hospital where Dr. Sullivan examined him and found a nephritic condition."

In the case of *Rainko, supra,* 331, the Court turned to the opinion of physicians to know whether there was damage to the body of the employee and learned that there was,

> ". . . bearing upon plaintiff's impaired physical condition, *Dr. Wittenberg in part testified*:
>
> 'I was their family doctor. I have known this woman for a long time and I have tried to rule out everything else, gall bladder, intestinal trouble of organic nature, stomach trouble of organic nature, and I have not been able to find any other cause, nor had she any of these complaints prior to this incident; and I believe whatever it was that started this gas, or what she was subjected to, irritation, probably affects her through the central nervous system; that *it must have had an effect on the brain and the spinal cord,* because her complaints, at the present time, are along that line, and, possibly, some degeneration of certain parts of the brain or spinal cord, nerve degeneration." (emphasis supplied)

Certainly, the employee in the case of *Rainko, supra,* did not have some existing condition which became symptomatic at work. There was no existing condition before work. There was damage at work which was identified by doctors however imprecisely because of the technology which was then available.

The Court accurately said in *Rainko, supra,* 332, that a *personal injury* included damage which was within the body as well as visible,

> "[i]t is not necessary to establish physical injury (resulting in) outward evidence of violence or trauma to justify an award of compensation. In *La Veck* v. *Parke, Davis & Co.*, 190 Mich. 604 (L. R. A. 1916 D, 1277), an award of compensation was affirmed notwithstanding it was stated in the opinion, 'No visible accident occurred and no event causing external violence to applicant's body.'"

This case law gloss of section 301(1), first sentence, only means that the place of a *personal injury* in the body of an employee is not important. Damage to the heart muscle inside the body is as much a personal injury as damage to skin such as a laceration. And this is correct. Nothing in the text of section 301(1), first sentence, suggests that damage to an internal organ, internal muscle, or bone is not an injury. While the place of a personal injury does not matter, that in no way changes the requirement that there must be medically identifiable damage to the body of the employee.

In sum, there is only one decision by the Court saying that the symptoms of an existing condition is a *personal injury* which is *Carter, supra*.

*Carter, supra*, and all of its progeny such as *Deziel, supra*, and *Fox v Detroit Plastic Molding and Corporate Service*, 106 Mich App 749; 308 NW2d 633 (1981), rev'd 417 Mich 901; 330 NW2d 690 (1983); *Thomas v Chrysler Corp*, 164 Mich App 549, 555; 418 NW2d 96 (1987), lv den 429 Mich 881 (1987); *McDonald v Meijer, Inc*, 188 Mich App 210, 215; 469 NW2d 27 (1991), lv den 439 Mich 902; 478 NW2d 623 (1991); *Anderson v Chrysler Corp*, 189 Mich App 325, 329; 471 NW2d 623 (1991), lv den 440 Mich 909; 489 NW2d 86 (1992); *Siders v Gilco, Inc*, 189 Mich App 670, 673; 473 NW2d 802 (1991), lv den 439 Mich 982; 483 NW2d 865 (1992); *Laury v General Motors Corp (On Rem) (On Reh)*, 207 Mich App 249; 523 NW2d 633 (1994), en banc hearing den, 207 Mich App 801; 524 NW2d 270 (1994), lv den 453 Mich 873; 554 NW2d 3 (1996); and *Mattison v Pontiac Osteopathic Hospital*, 242 Mich App 664; 620 NW2d 313 (2000), ceased as case law gloss on January 1, 1982, when the WDCA was amended to state that, *mental disabilities . . . shall be compensable if contributed to or aggravated or accelerated by the*

*employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof. Hurd, supra.* The Court should again say that, "we have no difficulty in holding that a case decided prior to the enactment of an amendment is not any authority for the interpretation of the amendment." *Harry Becker & Co, supra,* 164. Any other ruling makes case law an undifferentiated mass which is not subordinate to the text of a statute and impervious to change by the author of the text, the Legislature.

## RELIEF

Wherefore, defendant-appellant General Dynamics Land Systems, Incorporated prays that the Supreme Court reverse the order that was entered by the Court of Appeals, reverse the order that was entered by the Workers' Compensation Appellate Commission and remand the case to the Workers' Compensation Appellate Commission with the instruction to reverse the order that was entered by the Board of Magistrates and deny workers' disability compensation claimed by plaintiff-appellee E.W. Rakestraw.

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